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JAMES R. BROWNING

No. 879

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR FROMEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 3, 1959. The petition for a writ of certiorari was filed on April 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in its instructions correcting the arguments of petitioner's counsel that every element of an offense must be proved beyond *every* reasonable doubt.

2. Whether petitioner should have been acquitted on charges of defrauding a bank by "check kiting" because the manager of the branch bank honoring the checks participated in the scheme.

3. Whether the bank manager was guilty of misapplication of funds so as to render petitioner an aider and abettor.

STATUTES AND RULES INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 656 provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with

any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or

another would be an offense against the United States, is punishable as a principal.

Rule 30, F. R. Crim. P., provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

The petitioner was convicted in the District Court for the Western District of New York on four counts of an indictment charging that he used the mails to defraud [1] and four counts charging that he aided and abetted a bank officer in misapplying bank funds.[2] He was sentenced to five years' imprisonment on each of the first four counts, the sentences to run concurrently with each other, and five years' imprisonment on the other four counts, to run concurrently with each other, but consecutively to the first four counts, making a total of ten years' imprisonment (Appellant's App.

[1] 18 U.S.C. 1341.

[2] 18 U.S.C. 656 and 18 U.S.C. 2.

2–17).[1] The Court of Appeals affirmed, one judge dissenting (Pet. App. B).

The principal government witness was Edward A. Rick, Sr., manager of the Adam, Meldrum and Anderson branch of the Manufacturers and Traders Trust Co., of Buffalo, New York (hereinafter referred to as the Buffalo bank). Mr. Rick testified to a long series of "check kiting" transactions in which the petitioner would draw checks on an account which he had opened under a fictitious name in the Liberty Bank of Buffalo, Niagara Falls Office (hereinafter referred to as the Niagara bank) and would deposit or cash them with the Buffalo bank. Mr. Rick, although he knew that the checks were drawn on insufficient funds, assisted in the operation, juggled the accounts so as to deceive the bank examiner, and even covered some of them with his own funds (A.A. 1–37, 42–43, 89–91, 123, 189–211, 249).

Mr. Rick found himself getting constantly deeper in the operation and finally, on May 11, 1957, told the petitioner he could go no further, that he thought he was going to have a stroke. He went home that afternoon and did have a paralytic stroke (A.A. 50–60). The petitioner thereupon stopped payment on his outstanding checks, causing a total loss to the Buffalo bank of around $60,000 (A.A. 152–153, 170, 242).

The petitioner objected to any explanation of the reason for Mr. Rick's participation in this scheme and

[1] Appellant's Appendix in the Court of Appeals is referred to as "Appellant's App." Appellee's Appendix in the Court of Appeals, to which more frequent reference is made, is designated "A.A."

was partly successful in excluding testimony on the point (A.A. 109, 140–141). However, it did appear that Mr. Rick was previously involved with the petitioner at a time when the petitioner was operating under the name of Mack Farisi and that the petitioner owed Mr. Rick $9,500. Mr. Rick hoped to recover his personal loss by going along with the petitioner, a gambler, on this check kiting operation (A.A. 130, 136, 140–142).

Mr. Rick testified, on direct examination, that he had intentionally falsified the record for the purpose of deceiving the bank examiner (A.A. 34–35), that he had no authority to permit this kind of an operation (A.A. 42–43) and that he had no intention of making a loan to the petitioner (A.A. 65). He said, however, on cross-examination, that he did not intend to defraud the bank and intended to protect the bank against fraud (A.A. 79–80, 84). On redirect examination, Mr. Rick further testified that his honoring of the petitioner's worthless checks was done knowingly, deliberately and intentionally (A.A. 126). When the court insisted upon a "yes" or "no" answer to a question whether he believed at the time that the transactions were a fraud on the bank, he answered in the affirmative (A.A. 126–127). Asked whether his interest was primarily to protect himself, he responded, "He had me in a satchel. I was trying to get off the best I could." He was not seeking any monetary gain for himself, but was endeavoring to recoup his previous loss (A.A. 127–128, 142).

ARGUMENT

1. During the defense summation, it was argued that some of the elements of the offenses charged had not been established by the government "beyond every reasonable doubt" (Pet. 7). The trial court sought to correct this misstatement of the law in the following manner (Appellant's App. 23):

> There has been an expression used from time to time that it is the burden of the Government to prove every element of the crime alleged beyond every reasonable doubt. That is not the law. It is proof beyond a reasonable doubt and not necessarily to a mathematical certainty. There is no obligation whatsoever upon the defendant to prove his innocence. The presumption of his innocence remains throughout this case unless and until you reach a verdict wherein you find the defendant guilty of the elements of the crime of any or some of the above counts beyond a reasonable doubt. The burden is upon the Government to prove the guilt of the defendant as to each count beyond a reasonable doubt and that burden never shifts to the defendant but rests upon the Government until the end of the case which will be when your verdict is given.

The petitioner's counsel stated that he had no objection to the charge, other than the failure to give certain requested instructions (Appellant's App. 34). However, after the jury had retired to consider its verdict, the petitioner's counsel made the following statement (Appellant's App. 37):

> I except to that portion of your Honor's charge where in substance you stated to the

> jury that it was not necessary for the jury in order to convict to find the defendant guilty of the various charges to be convinced of the defendant's guilt beyond every reasonable doubt on every element of the crime, it being my claim that every reasonable doubt is the correct statement of what the defendant is entitled to.

Aside from the fact that, under Rule 30, the objection came too late, there is no merit to the contention that the government's proof must establish its case beyond *every* reasonable doubt. The traditional expression is that, in order to convict, the proof must be beyond *a* reasonable doubt, which has a very different ring. The elimination of every reasonable doubt would be virtually proof to a mathematical certainty, which is definitely not the test of the required quantum of proof. *Holland* v. *United States*, 348 U.S. 121, 138. No case has been cited, and none has been found, holding that the measure of proof required is that stated in the defense summation.

2. Relying on the dissenting opinion below, the petitioner argues that, in view of the fact that Mr. Rick, the bank manager, knew that there were insufficient funds to pay the checks, the petitioner could not be said to have defrauded the bank. This in turn rests on the factual assumption that Mr. Rick was acting for the bank and was in reality extending credit to the petitioner, the dissenting judge admitting that the petitioner's conviction might be justified if Mr. Rick was acting "not in the interest of the bank, but in aid of the customer's attempt to cheat the bank" (Pet. 25). The view of the facts accepted by the dis-

sent below was, however, rejected by the jury, which had been charged (Appellant's App. 31), that "[i]f the bank officer was in good faith extending credit to the defendant, even though unbeknown to the defendant, he exceeded his authority in so doing, you cannot convict the defendant on any of the counts in this indictment." The theory that Mr. Rick was acting for the bank is not supported by Mr. Rick's testimony. While Mr. Rick asserted he did not intend to defraud the bank, it is evident that he meant that he did not intend to have the bank suffer an ultimate loss. His testimony made it perfectly clear that he knew he had no authority to permit the check kiting operation; that he was acting on his own, and not for the bank, in permitting it; and that the petitioner knew he was getting Mr. Rick to act on his own, and not for the bank, when he told Mr. Rick to "play along with him and he would get his hands on some money and bail [the checks] out" (A.A. 23). Under these circumstances, Mr. Rick's knowledge is not imputable to the bank. *American Surety Co.* v. *Pauly*, 170 U.S. 133, 156; *American National Bank* v. *Miller*, 229 U.S. 517, 521; *Mutual Life Insurance Company* v. *Hilton-Green*, 241 U.S. 613, 622.

The presentation of checks on an account known to be insufficient to cover them was a false representation to the Buffalo bank, which cashed them. *Federman* v. *United States*, 36 F. 2d 441 (C.A. 7), certiorari denied, 281 U.S. 729. The fact that the petitioner found an accomplice in the manager of that bank would not excuse his own criminal misconduct. The use of the mails was therefore in the perpetration of

a scheme to defraud the bank. See *Deschenes* v. *United States*, 224 F. 2d 688 (C.A. 10); *United States* v. *Lowe*, 115 F. 2d 596, 598 (C.A. 7), certiorari denied, 311 U.S. 717; *United States* v. *Feldman*, 136 F. 2d 394 (C.A. 2), affirmed, 322 U.S. 487. See also *Pereira* v. *United States*, 347 U.S. 1, 8.

3. There is also no doubt that Mr. Rick, aided and abetted by the petitioner, was guilty of misapplication of the funds of the bank. Here again, the jury rejected—properly under the evidence—the version of the facts on which the dissent rests. The jury were told that, if they had a reasonable doubt as to Mr. Rick's intent to defraud the bank, they had to acquit the petitioner; that a mere finding of false entries by Mr. Rick would not support the charge (Appellant's App. 29–30). On this aspect of the case, also, the dissenting judge below confused Mr. Rick's ultimate hope of recouping losses and paying back the bank, with his immediate intent in acting as he did. There is a misapplication of bank funds, in violation of 18 U.S.C. 656, when an officer deliberately pays funds of the bank to a person he knows is not entitled thereto (*Coffin* v. *United States*, 156 U.S. 432, 450), even if he hopes that the loss to the bank will be only for a temporary period (*United States* v. *Nystrom*, 237 F. 2d 218 (C.A. 3)).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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